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~~No. 95-870~~

Supreme Court, U.S.
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In The

Supreme Court of the United States

CITY OF INDIANAPOLIS, INDIANA, AND BART PETERSON, IN HIS OFFICIAL CAPACITY AS MAYOR OF THE CITY OF INDIANAPOLIS,

Petitioners,

v.

JAMES EDMOND, JOELL PALMER, ON THEIR OWN BEHALF AND ON BEHALF OF A CLASS OF THOSE SIMILARLY SITUATED,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KENNETH J. FALK
Counsel of Record

JACQUELYN E. BOWIE
SEAN C. LEMIEUX
E. PAIGE FREITAG
CHRISTOPHER M. GIBSON
Indiana Civil Liberties Union
1031 E. Washington St.
Indianapolis, IN 46202
317/635-4059

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Are traffic checkpoints where motor vehicles are stopped without probable cause for the sole purpose of attempting to ascertain probable cause to conduct searches of the vehicles for unlawful drugs, violative of the Fourth Amendment to the United States Constitution?

PARTIES TO THE PROCEEDING

Petitioners at the time of the filing of the Petition were the City of Indianapolis, Indiana and Stephen Goldsmith in his official capacity as Mayor of the City of Indianapolis. On January 1, 2000, Bart Peterson was inaugurated as Mayor of the City of Indianapolis. His name has been substituted pursuant to Rule 35.3.

Respondents are James Edmond and Joell Palmer, on their own behalf and on behalf of a certified class. The class is defined as:

> any and all persons driving vehicles who have been stopped or are subject to being stopped in the future at the drug interdiction roadblocks maintained by the City of Indianapolis in an attempt to interdict and curtail unlawful drug use.

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STATEMENT OF THE CASE

Since August of 1998, the City of Indianapolis, through the Indianapolis Police Department, has been conducting drug interdiction roadblocks or checkpoints in the City. (Petitioner's Appendix [hereinafter "Pet. App."] 25a). The sole purpose of the roadblocks is to stop the flow of unlawful drugs in Indianapolis. (Pet. App. 51a).[1]

ARGUMENT

Reasons for Denying the Writ

Plenary review in this case is inappropriate for three reasons. First, this case comes to the Supreme Court in

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[1] The parties stipulated that the checkpoints were designed "to interdict unlawful drugs in Indianapolis." (Pet. App. 51a). The checkpoint policy is formally entitled "Drug Checkpoint Contact Office Directives By Order of the Chief of Police" and it makes clear that the sole purpose of the checkpoints is to effect a stop of cars so that a determination can be made as to whether there is probable cause to conduct a further search. (Pet. App. 53a). The trial court reviewed the uncontested facts and found that a secondary purpose of the checkpoints was to check licenses and registrations. (Pet. App. 44a). However, the City has never advanced an actual secondary or a regulatory purpose. The purpose for stopping the cars is to be able to discover illegal activity, either through "plain view" searches, or through creating probable cause either by utilizing drug sniffing dogs or in some other way. The Seventh Circuit recognized that the purpose of the roadblocks is "to catch drug offenders" and that the "program of drug roadblocks belongs to the genre of general programs of surveillance which invades privacy wholesale in order to discover evidence of crime." (Pet. App. 2a, 9a).

the context of an appeal of the denial of a preliminary injunction. There is not a well developed record and the district court should be allowed to fully develop the factual record prior to plenary review. Secondly, although the question of the constitutionality of drug interdiction checkpoints combined with legitimate regulatory stops is one that may very well split the circuits, *cf. United States v. Huguenin*, 154 F.3d 547 (6th Cir. 1998) and *United States v. Morales-Zamora*, 974 F.2d 149 (10th Cir. 1992) with *Merrett v. Moore*, 58 F.3d 1547 (11th Cir. 1995), *cert. den.* 519 U.S. 812 (1996), that is not the issue decided by the Seventh Circuit in this case. There is no split in the circuits over the constitutionality of stopping vehicles at checkpoints whose sole purpose is to investigate criminal activity. The circuit courts which have addressed this question all agree, as did the Seventh Circuit in this case, that such stops are violative of the Fourth Amendment. Third, the Seventh Circuit's decision is clearly correct and conforms to settled law from this Court.

A. Given the limited record in this case, plenary review should be denied

The petitioners are seeking plenary review of the Seventh Circuit's reversal of the trial court's determination, in the context of a preliminary injunction ruling, that the respondents could not demonstrate a probability of success on the merits. In ruling for the respondents, the Seventh Circuit did not enter final judgment or even order that a preliminary injunction be entered for the respondents. The Seventh Circuit noted that "[b]ecause it

was decided by the district court on a very skimpy stipulation of facts, our ruling on the legality of the City's program is necessarily tentative." (Pet. App. 2a). The Seventh Circuit further noted that "[w]hether there may be other grounds for denying the preliminary injunction, or whether on a fuller record the Indianapolis program might pass Fourth Amendment muster, are issues for the district court to decide in the first instance." (Pet. App. 12a).

Respondents are confident that they will prevail on the eventual remand of this case to the trial court. However, the above comments by the Seventh Circuit demonstrate there must be a further development of the factual record before plenary review should be considered.

B. The circuit courts which have specifically addressed the question all agree that where the sole purpose of a roadblock is to investigate criminal activity it is unconstitutional if the stop is not supported by probable cause

The traffic checkpoints in this case were designed for one purpose, to look for illegal drug activity. No circuit court has ever upheld such a program, and thus there is no circuit conflict on the core constitutional issue presented by this case.

Prior to the Seventh Circuit's decision in this case, there were three circuit court cases concerning roadblocks which had as their purpose, at least in part, the interdiction of unlawful drugs. In *United States v. Morales-Zamora, supra,* an individual was stopped at a roadblock which

had been ostensibly set up to check licenses and registrations. However, as a matter of fact, the real purpose for the stop was to give drug sniffing dogs the opportunity to sniff the car as the licenses and registrations were being examined. The Tenth Circuit court found that an arrest of an individual who was found to possess drugs after being stopped was unconstitutional. In making this finding the court noted that even "the government agrees that under the Fourth Amendment it could not set up a roadblock for the sole purpose of subjecting all the stopped vehicles to a canine sniff of the exterior of the car." 974 F.2d at 151.

The Sixth Circuit reached a similar conclusion in *United States v. Huguenin, supra,* where law enforcement authorities had set up vehicle checkpoints. In striking down the use of a sobriety checkpoint as a subterfuge to search for illegal drugs, the court explained, "[a]lthough the prevention of drug trafficking is an important government interest, we do not believe it warrants this type of pretext when there in no traffic violation, no probable cause, and not even reasonable suspicion to otherwise stop the vehicle, because the severity of interference with individual liberty is too great." 154 F.3d at 559.

Merrett v. Moore, supra, is not to the contrary. To be sure, the Eleventh Circuit did uphold an arrest made following a roadblock, but only after concluding that the roadblock had as a legitimate purpose both the checking of licenses and registrations as well as exposing vehicles to drug sniffing dogs. The court did not find that a roadblock designed solely to interdict drugs was constitutional and indeed, explicitly left that question open. 58 F.3d at 1551, n. 3.

Here, the Seventh Circuit was faced with the question left open in *Merrett*, is a roadblock designed solely to interdict drugs constitutional? Following the Sixth and Tenth Circuits, the Seventh Circuit's answer to that question was no. Petitioners are unable to point to a single circuit, including the Eleventh Circuit in *Merrett*, which has held otherwise. There is therefore no division in the circuits over this question.

Admittedly, the Missouri Supreme Court, in *State v. Damask*, 936 S.W.2d 565 (Mo. 1996), upheld a roadblock which, like this one, was designed solely to interdict drugs.[2] In upholding the roadblocks the court conceded that "there is apparently no case law that upholds the constitutionality of a checkpoint established solely to interdict drugs." 936 S.W.2d at 572. However, the fact that the Missouri Supreme Court reached a different conclusion than the Seventh Circuit, the Tenth Circuit in *Morales-Zamora* and the Sixth Circuit in *Huguenin*, as well as a number of other courts [*see e.g., Garcia v. State*, 853 S.W.2d 157 (Tex.Ct.App. 1993) and *Galberth v. United States*, 590 A.2d 990 (D.C.App. 1991)], does not demonstrate a division of authority justifying plenary review.

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[2] In *State v. Everson*, 474 N.W.2d 695 (N.D. 1991), cited by petitioners, the roadblocks had as their primary purpose the interdiction of drugs. However, a legitimate secondary purpose was to conduct vehicle inspections and the court found that the state had "a vital interest in ensuring that the vehicles on its roads are safe for operation, and that licensing requirements are being observed." 474 N.W.2d at 701 This is obviously different from the roadblocks in Indianapolis, which did not have a dual purpose.

C. The Seventh Circuit's decision conforms to the decisions of this Court

The Seventh Circuit's decision in this case conforms to the rule established by this Court that if a search or seizure is for the purposes of criminal investigation it must be supported by probable cause. A search or seizure without probable cause can be justified only if there are special circumstances unrelated to criminal investigation. The decision also conforms to the rule that, although the subjective intent of the police is irrelevant if probable cause for a search or seizure exists, without probable cause a criminal investigatory search is not constitutional. Because the Seventh Circuit's decision is consistent with the decisions of this Court, plenary review should be denied.

The principle of individualized suspicion is central to the Fourth Amendment. This Court has never deviated from the principle that if police are conducting a criminal investigation there must be cause prior to a search or seizure. In *Chandler v. Miller*, 520 U.S. 305, 308 (1997), this Court noted that searches conducted in the absence of reasonable suspicion are exceptional:

> Searches conducted without grounds for suspicion of particular individuals have been upheld, however, in "certain limited circumstances." See *Treasury Employees v. Von Raab*, 489 U.S. 656, 668 . . . (1989). These circumstances include brief stops for questioning or observation at a fixed Border Patrol checkpoint, *United States v. Martinez-Fuerte* . . . , or at a sobriety checkpoint, *Michigan Dept. of State Police v. Sitz* . . .

Searches in the absence of probable cause can occur, however, when "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989) (internal quotation and citation omitted). However, the exception that the petitioners seek to the general rule requiring probable cause would swallow the rule of individualized suspicion.

In *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990), sobriety checkpoints were approved. However, the Court noted that the state's interest was not in investigating criminal activity, but in safeguarding against the immediate danger posed by persons who are drunk and are operating motor vehicles. 496 U.S. at 455. This is a regulatory purpose, not a criminal investigatory one. Thus *Sitz* is clearly distinguishable from this roadblock where the sole purpose is to stop persons long enough to form probable cause to conduct a warrantless search.

Similarly, *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), upheld the constitutionality of immigration checkpoints that caused brief detention of vehicles. These were upheld not as criminal investigatory searches, but because of the need to turn back from our border areas "deportable aliens." 428 U.S. at 553. This Court has long recognized the distinction between stopping vehicles without probable cause in the hope of finding evidence of criminal activity and stopping persons "crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in . . . " *Carroll v. United States*,

267 U.S. 132, 153-54 (1925). Immigration checkpoints are "undertaken primarily for administrative rather than prosecutorial purposes." *Almeida-Sanchez v. United States*, 413 U.S. 266, 278 (1973) (Powell, J., concurring).[3]

The distinction, therefore, is between criminal investigatory seizures and searches and those which have another, administrative or regulatory purpose. As noted by the Seventh Circuit, the roadblocks at issue in this case do not further a regulatory purpose:

> Indianapolis makes no attempt to defend its roadblocks on the basis that it is trying to exclude a harmful substance or dangerous persons. Though that may be the ultimate aim, the City concedes that its proximate goal is to catch drug offenders in the hope of incapacitating

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[3] This Court recognizes the constitutional significance between administrative searches, which can occur without specific probable cause, and criminal investigatory searches, which require cause, in other contexts besides traffic checkpoints. Administrative inspections to enforce building codes without specific probable cause were allowed in *Camara v. Municipal Court*, 387 U.S. 523 (1967), where violations of the codes could in fact be criminal but the searches did not have a criminal investigatory purpose.

> Unlike the search pursuant to a criminal investigation, the inspection programs at issue here are aimed at securing city-wide compliance with minimum physical standards for private property. The primary governmental interest at stake is to prevent even the unintentional development of conditions which are hazardous to public heath and safety.

387 U.S. at 531.

> them, and deterring others, by criminal prosecution. The program has no regulatory purpose that might be compared to that of immigration laws, which seek to exclude and deport illegal immigrants rather than just to prosecute them for criminal violations of the immigration laws.

(Pet. App. 10a). This decision, therefore, falls squarely within the prior decisions of this Court establishing a clear distinction between searches and seizures with a regulatory purpose and those with a criminal investigatory purpose. The latter require probable cause. The former may not if they are supported by special needs unrelated to criminal investigation.

Petitioners nevertheless argue that they are allowed to set up a roadblock, which uses traffic safety as a regulatory reason to cause vehicles to stop without probable cause, and then convert the stop into a criminal investigatory search for drugs, even though the overall purpose of the stop from its very inception is a criminal investigatory one. Petitioners argue that the distinction between a regulatory stop and a criminal investigatory one is not appropriate since this Court has held that the government's motive or intent is irrelevant in the Fourth Amendment context. (Petition for Writ of Certiorari at 20-21). While *Whren v. United States*, 517 U.S. 806 (1996), held that an officer's subjective motivations are irrelevant if a traffic stop is otherwise justified under the Fourth Amendment because probable cause exists regardless of the subjective motivations, this Court specifically distinguished cases involving "police intrusion without the probable cause that is its traditional justification" from a search founded on probable cause that is nevertheless

driven by the subjective intent of the officers. 517 U.S. at 817. In other words, intent is irrelevant only if probable cause exists. However, this Court has never authorized a search for criminal investigatory purposes absent probable cause. Indeed, as the Court noted in *Whren*, "the exemption from the need for probable cause (and warrant), which is accorded to searches made for the purpose of inventory or administrative regulation, is not accorded to searches that are *not* made for those purposes." 517 U.S. at 811-12 (emphasis in original). Subjective intent can not override the lack of probable cause.[4]

This is certainly what this Court has intimated in earlier cases; if a roadblock without cause has as its purpose the investigation of criminal activity, it is unconstitutional since the seizures and searches occasioned by the traffic stops are without cause. For example, in *Texas v. Brown*, 460 U.S. 730 (1983), the Court addressed the question of whether the "plain view" doctrine allowed a search and seizure of evidence which an officer saw while an individual was stopped at a driver's license checkpoint. This Court found that the plain view doctrine did apply and that the Fourth Amendment did not preclude

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[4] In his dissent in the Seventh Circuit, Judge Easterbrook ignores this essential point. Contrary to what Judge Easterbrook contends, the majority does not hold that the constitutionality of a roadblock turns on what the law enforcement officials think. The issue is not one of subjective intent, since the issue of intent is immaterial if there is not probable cause. The majority decision below correctly holds that the constitutionality of a roadblock turns on whether the roadblock exists for criminal investigatory purposes. If so, probable cause must be present.

the seizure. However, then Justice Rehnquist, in his plurality opinion, noted that there was no indication that "the roadblock was a pretext whereby evidence of narcotics violation might be uncovered in 'plain view' in the course of a check for driver's licenses." 460 U.S. at 743. If the purpose of the roadblock was to uncover evidence of criminal activity, the plain view exception would not have applied since the initial stop would not have been lawful for " 'plain view' provides grounds for seizure of an item when an officer's access to an object has some prior justification under the Fourth Amendment." 460 U.S. at 738. Thus, under *Texas v. Brown*, a roadblock which is designed to elicit evidence of a crime, is not a justification for a stop under the Fourth Amendment.[5] *See also, South Dakota v. Opperman*, 428 U.S. 364, 376 (1976) (upholding routine inventory search of impounded car that uncovered marijuana absent any suggest that the search "was a pretext concealing an investigatory police motive.")

Thus, the Seventh Circuit's decision is entirely consistent with prior decisions of this Court. By contrast, it is petitioners who are seeking an unwarranted extension of the law that would distort accepted Fourth Amendment

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[5] Petitioners argue that this portion of *Texas v. Brown* is only dicta and has been overruled by *Horton v. California*, 496 U.S. 128 (1990). In *Horton* the Court found that evidence can properly be seized under the plain view exception even if the discovery of the evidence is not inadvertent. The *Horton* Court did nothing to change the opinion expressed by the plurality in *Texas v. Brown* that a lawful seizure cannot occur if the original stop giving rise to the seizure is a mere pretext to try to find evidence in plain view.

jurisprudence. There is no need to expand the well accepted boundaries of the Fourth Amendment and there is no need to change the current calculus, which recognizes that cause must be shown for a criminal investigatory search.

CONCLUSION

Certiorari is not warranted. The limited record in this cause cautions against the granting of plenary review. And, the Seventh Circuit decision conforms to other circuits as well as decisions of this Court. There are no grounds for granting the petition and for the foregoing reasons it should be denied.

Respectfully submitted,

KENNETH J. FALK
Counsel of Record
JACQUELYN E. BOWIE
SEAN C. LEMIEUX
E. PAIGE FREITAG
CHRISTOPHER M. GIBSON
Indiana Civil Liberties Union
1031 E. Washington St.
Indianapolis, IN 46202
317/635-4059

Counsel for Respondents